

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAMON REYES

Claimant

VS.

CENTIMARK CORPORATION

Respondent

AND

AMERICAN CENTURY CO.

Insurance Carrier

Docket No. 1,007,295

ORDER ON REMAND

On December 2, 2009, the Kansas Court of Appeals reversed and remanded the Appeals Board's June 10, 2009 Order for further consideration in accord with *Bergstrom v. Spears Manufacturing Company*¹, under Supreme Court Rule 7.041. The Board heard oral argument on February 9, 2010. Claimant appeared by and through his attorney John G. O'Connor, of Kansas City, Kansas. James L. MowBray, of Overland Park, Kansas appeared for respondent and its insurance carrier (respondent).

APPEARANCES

John G. O'Connor, of Kansas City, Kansas, appeared for the claimant. Timothy G. Lutz, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board again has considered the record and adopted the stipulations listed in the ALJ's Award Upon Review and Modification (Award) dated January 23, 2009. At oral argument, the parties agreed that claimant's actual wage loss, as of July 26, 2006, was 100 percent.

¹ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

ISSUES

At issue is the nature and extent of claimant's impairment. Specifically, whether he is entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a). The ALJ originally granted claimant's request for a work disability, entering an Award for 62.88 percent, a finding which reflected a 61.75 percent task loss and a 64 percent wage loss. The ALJ's conclusion with respect to claimant's wage loss included a finding that claimant appropriately left respondent's employ but had failed to employ a "good faith" effort at finding appropriate post-injury employment. Thus, wages were imputed to him.

Both parties appealed the ALJ's Award to the Board, which reviewed the parties' claims and concluded that the ALJ's Award should be modified. The Board concluded that claimant failed to exhibit "good faith" in retaining his position with respondent. Thus, he was not entitled to a work disability award but rather, was limited to his functional impairment.

Claimant appealed the issue to the Kansas Court of Appeals, taking issue with the Board's conclusion as to claimant's lack of good faith in voluntarily abandoning an accommodated position. According to claimant's counsel, this was the sole issue brought before the Court of Appeals.

On December 2, 2009, the Court of Appeals issued an Order reversing and remanding this case in light of the Kansas Supreme Court's recent holding in *Bergstrom*.²

Claimant now asks the Board to modify the ALJ's Award, acknowledging his 100 percent actual wage loss and the 61.75 percent task loss imposed by the ALJ in the Award.³ Although claimant also asserted that he is permanently and totally disabled under K.S.A. 44-510c(2), that issue was not made a part of claimant's appeal to the Court of Appeals. Both the ALJ and the Board have already determined that claimant is not permanently and totally disabled and that finding has not been appealed. Thus, the Board's findings as to permanent total disability are res judicata.

Respondent argues that the *Bergstrom* opinion does not give injured claimants a "free pass" to voluntarily quit work in an effort to increase the workers compensation benefits they receive. Respondent further contends that claimant has failed to establish a physical change in his condition and does not qualify for additional compensation under

² *Id.*

³ While the parties could not agree upon the claimant's task loss, claimant contends that it matters little which task loss opinion the Board uses in calculating his work disability. According to claimant, there are only 57.22 weeks of remaining benefits available to him in this Award and even the lowest percentage (29 percent) of task loss, when averaged with the 100 percent wage loss, yields a figure that translates to a sum in excess of \$100,000, the maximum value of claimant's award. K.S.A. 44-510f(3).

the review and modification statute. Respondent maintains claimant is entitled to no further compensation beyond the functional impairment he has already received.⁴

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that its prior Order should be modified to reflect an 81 percent work disability, which reflects a 100 percent wage loss and a 61.75 percent task loss.

As explained above, the only issue to be determined at this juncture of the proceedings is the nature and extent of claimant's work disability under K.S.A. 44-510e(a) and in light of the recent dictates of *Bergstrom*, a case that was issued after the Board considered the ALJ's original Review and Modification Award. The *Bergstrom* decision abrogated the "good faith" requirement for work disability. Consequently, the Board's analysis must change to conform to the current state of the law.

The test is no longer whether claimant made a "good faith" effort post-injury to retain his employment with respondent and/or to find appropriate employment. Instead, the Supreme Court in *Bergstrom* said that the factfinder should follow and apply the plain language of the statute. And although respondent most certainly does not agree with the Board's analysis on this point, the Board does not find any support for respondent's argument that injured claimants should not be given a "free pass" to quit an accommodated job. Quite bluntly, there is no statutory basis for respondent's argument in the law post-*Bergstrom*. The focus is now solely upon the injured claimant's actual wage loss post-injury and the mathematical formula dictated by K.S.A. 44-510e(a). The reasons behind the claimant's job loss are irrelevant.

As noted in the Board's earlier Order dated June 10, 2009, K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.⁵ That statute specifically contemplates an instance where an injured employee's work disability (under K.S.A. 44-510e(a)) increases.⁶ Here, it is undisputed that claimant is no longer earning a comparable wage. He left respondent's employ and has not found subsequent employment, incurring a 100 percent wage loss. Under the *Bergstrom* rationale, the reasons behind his termination are irrelevant. The focus is now squarely upon claimant's actual wage loss during any period that work disability is claimed. Accordingly, the

⁴ The parties agree that claimant has not sustained any additional functional impairment as a result of his compensable injury.

⁵ *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

⁶ K.S.A. 44-528(a).

claimant is entitled to modification of his original Award and a finding that he bears a 100 percent wage loss.

The Board must also consider the claimant's task loss component to the work disability computation. There are 3 separate opinions, two from Dr. Jeffrey MacMillan and one from Dr. Peter Bieri. Both physicians utilized reports authored by Mike Dreiling and Dr. MacMillan had an additional report from Terry Cordray. Dr. Bieri opined that claimant had an 85 percent task loss (based on the 13 tasks outlined by Mike Dreiling). Dr. MacMillan opined that claimant had lost the ability to perform 5 of the 13 tasks outlined by Mr. Dreiling (38 percent) and 6-7 of the 14 tasks outlined by Mr. Cordray (46 percent).

The ALJ concluded that claimant had a 61.75 percent task loss which he indicated was an average of all three opinions. Although mathematically it would appear that 61.75 percent is an incorrect figure based upon the figures above, the Board finds that approach to be reasonable in this instance. In any event, the mathematical difference is inconsequential in the ultimate calculation of claimant's award. Nonetheless, the Board finds it appropriate to correct the calculation to accurately reflect the true average of the three task loss opinions. Accordingly, claimant's task loss is found to be 56.33 percent.

Claimant has already received \$75,278.85 in temporary total compensation and permanent partial compensation prior to this request for Review and Modification. The most compensation claimant can receive is \$100,000.⁷ Given his compensation rate of \$432 per week, at most he is entitled to an additional 57.22 weeks of compensation. And given his 100 percent wage loss and the 56.33 percent task loss, his resulting 78.16 percent work disability exceeds the 57.22 weeks available. And pursuant to the parties' agreement, the work disability became effective as of July 26, 2006 and continued for a period of 57.22 weeks until the maximum payout was achieved.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Board's Order dated June 10, 2009 is modified as follows:

As of July 26, 2006, claimant is entitled to the remaining 57.22 weeks of permanent partial disability payable at the rate of \$432 per week, all of which is due and owing and ordered paid in one lump sum.

⁷ K.S.A. 44-510f(3).

IT IS SO ORDERED.

Dated this _____ day of March 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Timothy G. Lutz,, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge